

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**HERBERGER CONSTRUCTION
COMPANY, INC.**
Warren County, Iowa

ADMINISTRATIVE CONSENT ORDER
NO. 2008-AQ- ~~35~~

TO: Herberger Construction Company, Inc.
Dennis Herberger, Registered Agent
10999 Inwood Street
Box 326
Indianola, Iowa 50125

Herberger Construction Company, Inc.
Dennis Herberger
2508 West 2nd Avenue
Indianola, Iowa 50125

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Herberger Construction Company, Inc., for the purpose of resolving violations pertaining to the open burning of trade waste. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Any questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Bill Gross, Field Office 5
Iowa Department of Natural Resources
401 SW 7th, Suite 1
Des Moines, Iowa 50309
Phone: 515/725-0628

Relating to legal requirements:

Anne Preziosi, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Urbandale, Iowa 50322
Phone: 515/281-6243

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

RECEIVED
SEP 11 2008

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: HERBERGER CONSTRUCTION COMPANY, INC.

II. JURISDICTION

This administrative consent order is issued pursuant to the provisions of Iowa Code sections 455B.134(9) and 455B.138(1) which authorize the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division II (air quality), and the rules promulgated or permits issued pursuant to that part; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. Herberger Construction Company, Inc., (Herberger Construction Company) specializes in bridge construction. The company has a yard located at 10999 Inwood Street in Indianola, which serves as a staging area and contains miscellaneous construction materials and equipment, including cranes and wooden bridge planks.

2. On June 19, 2008, DNR Field Officer Bill Gross observed black smoke emanating from the yard of Herberger Construction Company. Mr. Gross went to the site and found Herberger Construction Company employee Jerry Jones cleaning up the yard and burning old creosote-treated bridge planks in a pile. Mr. Jones stated to Mr. Gross that he was unaware of the DNR rules prohibiting illegal open burning, although he has worked for Herberger Construction Company for over twenty years.

3. A July 1, 2008, Notice of Violation letter was sent to Herberger Construction Company from DNR Field Office 5, citing the open burning violations occurring on June 19, 2008. Copies of DNR rules containing the prohibition on illegal open burning and illegal open dumping were included with the letter.

4. Herberger Construction Company has a history of illegal open dumping and illegal open burning of trade waste. Further, Herberger Construction Company has specifically been informed in the past of DNR's rules prohibiting open burning

5. On December 12, 2000, DNR Field Office 5 received a complaint about improper open burning and black smoke present at the junction of Highways 65, 69, and 5 in Warren County.

6. On January 4, 2001, Bill Gross of DNR Field Office 5 visited the area and found no evidence of open burning due to new snow cover. Mr. Gross contacted Dennis Herberger of Herberger Construction Company and Mr. Dennis Herberger said he would check to see if anyone did open burn. Mr. Dennis

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: HERBERGER CONSTRUCTION COMPANY, INC.

Herberger requested a copy of the state open burning rules, and those rules were sent to him by DNR.

7. On January 8, 2001, Mr. Dean Herberger called DNR Field Office 5 and reported that Herberger Construction Company employees burned some scrap lumber in burn barrels to keep warm, but that Diversified Contractors, another contractor at the site, might have burned some plastic tarps.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.133 provides that the Environmental Protection Commission (Commission) shall establish rules governing the quality of air and emission standards. The Commission has adopted 567 IAC chapters 20-34 relating to air quality.

2. 567 IAC 23.2(1) prohibits any person from allowing, causing, or permitting open burning of combustible materials, except as provided in 23.2(2) (variances) and 23.2(3) (exemptions). The burning of trade waste is specifically prohibited. The above facts demonstrate violations of this provision.

V. ORDER

THEREFORE, DNR orders and Herberger Construction Company agrees to do the following:

1. Pay a penalty of \$1,000.00 (one thousand dollars) within 30 days of the date this order is signed by the Director; and

2. Immediately halt improper illegal open burning of trade wastes and other materials at any location in the State of Iowa, and comply in the future with all state and local requirements regarding the prohibition against illegal open burning.

VI. PENALTY

Pursuant to the provisions of Iowa Code section 455B.109 and 567 IAC chapter 10, which authorize the Director to assess administrative penalties, a penalty of \$1,000.00 is assessed. The penalty must be paid within 30 days of the date this order is signed by the Director. The administrative penalty is determined as follows:

Iowa Code section 455B.146 authorizes the assessment of civil penalties of up to \$10,000.00 per day of violation for the air quality violations involved in this matter. More serious criminal sanctions are also available pursuant to Iowa Code

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: HERBERGER CONSTRUCTION COMPANY, INC.

section 455B.146A.

Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties at 567 IAC chapter 10. Pursuant to this rule, DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative order with a penalty. The administrative penalty assessed by this order is determined as follows:

Economic Benefit – Herberger Construction Company has achieved an economic benefit from open burning. It has saved time, labor, and landfill costs by not timely and properly removing, transporting and disposing of solid wastes from the site. The estimated amount of bridge planks that have been burned is two tons. Proper disposal at a landfill would have required a landfill tipping fee of \$50.00 per ton and a transportation cost of \$100.00. Based on these considerations, \$200.00 is assessed for this factor.

Gravity of the Violation – The burning of creosote-treated planks releases hazardous air pollutants, particulate matter, and other pollutants. These air pollutants pose a health risk to persons breathing, particularly persons with pre-existing respiratory problems. Further, the pollutants resulting from open burning may pollute groundwater, and pose a risk to both human health and the environment. The violation threatens the integrity of the regulatory program because compliance with the open burning regulations is required of all persons in this state. Based on the above considerations, \$300.00 is assessed for this factor.

Culpability – Herberger Construction Company has a duty to remain knowledgeable of the DNR's requirements and to be alert to the probability that its conduct is subject to DNR's rules. Further, in this case Herberger Construction Company was specifically informed of the DNR's rules regarding open burning in the past. Apparently, this information was not relayed to all its employees. Therefore, \$500.00 is assessed for this factor.

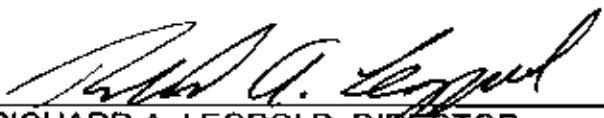
VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Herberger Construction Company. For that reason Herberger Construction Company waives its rights to appeal this administrative consent order or any part thereof.

VIII. NONCOMPLIANCE

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: HERBERGER CONSTRUCTION COMPANY, INC.

Failure to comply with this administrative consent order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.146. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order.



RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 17 day of
Sept., 2008.



AUTHORIZED AGENT
Herberger Construction Company, Inc.

Dated this 9th day of
September, 2008.

Warren County Air Quality file; Anne Preziosi; DNR Field Office 5; Bill Gross; VII.C.2